



**Shoreland Management Advisory
Committee Meeting Notes
December 12, 2002
Wisconsin Lions Camp, Rosholt**

I. Welcome – Al Shea – Advisory Committee Chair and Director of the Bureau of Watershed Management, Department of Natural Resources

Shea – Welcomed new representatives

1. Tom Onofrey – Marquette County Zoning Administrator, a substitute for Karl Kastrosky
2. Richard Stadelman – Wisconsin Towns Association
3. Paul Mongin – Wisconsin Conservation Congress and
4. John Larson – Applied Ecological Services

Note: All the above associations are members of the original NR 115 Advisory Committee, it is just the first meeting their members were able to participate.

Review of Minutes: Nancy Russell asked to have the minutes from the November 21, 2002 meeting amended to reflect her comments more accurately. The minutes will now read – The people of Wisconsin own the water and in Lake Geneva we regulate the appearance of commercial buildings – what is the difference in regulating the appearance of homes?

II. Agenda Review

Phillip Gaudet (Washington County) – WCCA: WCCA would like to see additional agenda items added to future meeting agendas beyond 4 big issues.

Q. Will there be a vote on each issue?

Shea - This committee is not a voting committee; a consensus is not likely in such a diverse group. You will be asked to identify a preferred option or options in each topical area of the issue specific meetings. The DNR staff will take issues and concepts raised by advisory committee to the Natural Resources Board saying

“Here are the things that we agreed on; here are the things that we didn’t agree on; and these are some of the alternatives that were discussed.”

Q: Will there be an opportunity for public comment at future meetings?

Shea – We will consider allotting a limited time period for public comment.

Schiffmann – Are there rule drafts out there that you can share with us? Prior to meeting?

Shea – There are only drafts that will be shared at meetings on 4 big issues and other issues added to the agenda. At future meetings, hopes that committee members will share their analysis of the problems with the current rules to add to DNR’s perspective.

IV. Presentation – Richard Lehmann – Public Trust Doctrine:

- The state government is a trustee for the general public’s interest in navigable water
- Wisconsin Courts have said state (and DNR) have an affirmative obligation to protect the public interest (originally, navigation only – now, more broadly defined to include water quality, habitat, natural beauty seen from the water, etc.)
- Public intervenors office was originally established to represent the public, especially to protect the public trust in navigable waters.

History of Shoreland Zoning Law: “The law passed by a fluke” (a political accident). In first half of 1960’s, environmental and land use issues were important issues politically.

1959: Governor Nelson elected: formed Dept of Resource Development (DRD – created first state level land use plan). Governor Nelson and Governor Reynolds pushed many environmental programs (e.g. ORAP, local planning legislation).

Jacob Beuscher was an important advisor to Governors Nelson and Reynolds. He urged legislators to introduce various environmental bills. Jake decided that it would be a good idea to have a shoreland zoning statute.

1965: Warren Knowles became governor; Milwaukee Journal ran a 3-part series on Wisconsin's water quality about that time; study committees were formed in the Legislature. In 1965 legislative session, a shoreland bill was introduced (although it didn't have a hearing or get out of committee). Potter Committee was formed by Governor Knowles to consider how industry should be regulated to protect water quality and how state agencies should be organized (including regulation of septic systems). Beuscher was on the Potter Committee; the study committee (report issued May 1966) did not include Beuscher's shoreland legislation proposal.

Governor Nelson had become U.S. Senator Nelson; he recommended to the Democrats that they propose a substitute amendment so that Republicans would be blamed if it didn't pass. Beuscher's shoreland proposal was added to the Assembly substitute amendment (never had a public hearing). Governor Knowles surprised many and supported the bill, signed it and was re-elected by a wider margin than his original election.

The shoreland piece of the legislation had very little discussion or input in the normal legislative process. Dept. of Resource Development staff knew that it would be very tough to convince local governments to embrace shoreland zoning and they had very little time to develop rules, model ordinances, etc. It had to be eased in, and had to be simple. (Counties were offered only a \$1,000 grant to implement shoreland zoning.) DRD decided to utilize traditional zoning tools – requirements that were clear and “could be measured with a tape measurer.”

- Basis for 300 ft. and 1000 ft. shoreland boundary? Most lots are 200 feet deep; add road width equals 300 feet.
- 1000 feet was intended to include three tiers of lots around lakes (to deal with backlots having access rights)
- They feared that if they were too aggressive, citizens might demand repeal of the statute.
- They decided to require that every county should have a professional zoning administrator (which wasn't the case before). The first generation of “professional” zoning administrators had no relevant training or education however, were qualified because they were part of the community.

Many early zoning administrators didn't understand the legal basis for their shoreland ordinances.

1972: Just vs. Marinette Supreme Court case – The Justs filled a wetland area in the shoreland without a permit; they challenged the shoreland zoning statute and

Marinette County ordinances, and lost. The Supreme Court decided that the shoreland statute upheld the public trust in navigable waters. Richard Lehmann believes that the Public Trust Doctrine would support regulation beyond 300 feet from a navigable stream: based on 1987 M&I Bank case.

Wisconsin has had a reputation for innovative environmental programs. Critical area programs in 1960's (Wisconsin was a pioneer); program was almost adopted as a federal law in the Nixon administration.

Questions

Q: Where did 75-foot setback come from?

A (Dick): Principally created to allow sufficient room for a septic system with adequate setback from the water.

Q: What definition of "navigable waters" are you using?

A (Dick): Definition has evolved in the Courts, primarily; Although there have been some legislative changes.

The ownership of the beds of navigable waters is separate issue, to be considered.

Q: Flowage on the Wisconsin River – Is shoreland jurisdiction limited to 300 feet from the original riverbanks?

A: No

Q: What were homeowners told about properties that didn't comply with new requirements?

A (Dick): Existing nonconforming use and structures law, from general zoning, was carried over to shoreland zoning. (*When shoreland zoning statute was adopted)

Q: Have Courts interpreted the public trust doctrine to include public access?

A (Dick): No. Subdivision requirements in statute serve a public trust doctrine purpose, but weren't created by the Courts.

The shoreland zoning program has now taken roots in Wisconsin; it is generally supported and has been around for 34 years without reversal.

Q: Is grandfathering concept now defunct?

A: No

Richard asked Linda Meyer to clarify: “grandfathering” means only nonconforming use and nonconforming structure common law.

Al: If you have follow-up questions, you will generally be able to direct them to speakers; Dick Lehmann has agreed to respond to additional questions from committee members.

Toni: The Dept. plans to address committee member issues (suggested by committee members at the last meeting) in the meeting on the general issue that relates most closely to the committee members’ issue. She invited committee members to confirm that their issues have been captured (posted cards in the meeting room).

Q: Asked what the committee members could do to raise the issue of a statutory change to address inequity between incorporated and unincorporated areas:

A (Toni): maybe we could discuss it at last meeting; and could perhaps prepare an issue paper.

A (Al): we would want to make the Legislature aware of the committee’s concerns.

Q: What was rationale for not including incorporated areas in original law?

A (Dick): most cities and villages had zoning at that time; most unincorporated areas didn’t (a greater need for mandated county zoning).

- also: a “cleaner slate” in unincorporated areas
- also: lobbyists for cities and villages suggested that shoreland zoning not apply to incorporated areas (although not a lot of pressure was brought to bear)

V. Flexibility and Mitigation:

Michael Dresen – Examples of County Shoreland Zoning Ordinances

Linda Meyer – Permitting and

Toni Herkert – Options to Consider

Michael wants to provide examples of what some counties are doing to try to build some flexibility into their shoreland zoning ordinances.

Ch. NR 115 contains minimum shoreland standards (although the current minimum standards may not be adequate to protect the resources) – counties can’t be less restrictive.

Examples of Flexible Approaches:

1) Waterway classification: It doesn't make sense to adopt very restrictive, protective standards for new construction on waters with completely developed shorelines.

Classify "sensitive waters", "moderate development", and "general development" water classes: then development standards are tailored for each development classification.

2) Trade off of one-dimensional standard against another (example: Shawano County – White Lake) greater lot width will allow a reduced setback (but not less than NR 115 minimum setback).

3) Setback Reduction Formula Approach (with mitigation requirement): doesn't create a non-conforming structure and provides some predictability.

4) Using conditional use process to provide flexibility in dimensional standards, instead of relying on variance process.

5) Expansion of nonconforming structures: regulation varied based on the degree of nonconformity; mitigation required. (He suggested not using term "grandfathered")

Regulation of nonconforming structure can include using area cap instead of a 50% rule.

6) Conservation subdivisions: for larger parcels (at least 20 acres, usually 40 acres or more); usually dedicated open space requirement (doesn't need to be open to use by the public); may provide a "density bonus" in exchange for environmental features.

Mitigation required as environmental compensation for adverse impact of alterations and additions to nonconforming structures and new construction, potentially. A point system can allow some options for property owners.

These examples have all been local initiatives; these proposals give credit for good stewardship of the land that is already occurring.

Flexibility in Ordinances:

1) Simple permits; development fairly uniform and impacts predictable; standardized mitigation measures are adequate.

2) Discretionary conditional use or special exception permits: development design varies; impacts not predictable; mitigation measures must be tailored to specific projects.

3) Variances: only as a last resort, to avoid takings without just compensation.

Flexibility = complexity (complexity is a necessary “evil” to allow flexibility)

Multiple strategies must be used:

Education

Incentives, etc.

Questions

Q: How do you recommend that we deal with variances?

A: We have to live with them if they were previously granted and not challenged in a timely fashion.

Q: Why encourage expansion of nonconforming structures if they are supposed to be eliminated?

A: To allow maximum “reasonable use” in exchange for requiring mitigation.

Michael: All of these examples were submitted to DNR and were not disapproved by the DNR; all require detailed ordinance amendments.

Linda Meyer: Linda presented the differences between general permits, conditional uses and special exception permits and variances. Generally two types of land uses are allowed in each zoning district: permitted uses and conditional uses.

General Permits

- Permitted uses are authorized in all locations in a zoning district (a non-discretionary decision by the zoning administrator).
- They are listed for each district.
- General & specific standards apply and further conditions on development may not be added.

Conditional Uses

In designating conditional uses, a community has determined that such uses are not suited to all locations in a zoning district but may be authorized if adaptable to the limitations of a particular site and adjacent land uses.

- Conditional uses are generally limited to those listed in an ordinance for each zoning district.
- Review of applications is assigned by ordinance to the planning and zoning committee/commission, the board of adjustment/appeals or the governing body.
- A public notice and hearing are customary (though not required by state law) in order to provide neighbors and the public an opportunity to voice concerns about potential effects of proposed conditional uses.

Variances

- A variance does not create a nonconforming structure.
- A variance transfers with a property to subsequent owners.
- A standard is relaxed only for the specific project authorized (e.g. it does not create a new setback line).

Toni Herkert: Discussed information that is available on why people enjoy living on water. We'll be trying to balance public interest protection and private property rights. She outlined some mitigation components that might be included to incorporate flexibility.

VI. Nonconformities - Gary Heinrichs

Gary outlined the problems with existing approaches to regulation of nonconforming structures (**pointed out that under floodplain zoning, a 50% rule is required**)

VII. Development Density - Jennifer Wudi

Consequences of shoreline development:

- degrade water quality
- loss of wildlife habitat
- degrade natural scenic beauty
- cumulative impacts
- individual site impacts

She reviewed sediment run-off model power point slides (which will be explained in more detail at a subsequent meeting).

Chip Nelson: commented that some examples would violate current NR 115 standards.

Jennifer: examples are representative of what is out there; perhaps slide labels should be changed; she'll inform the person who developed these slides.

DNR is concerned that the density of people is increasing, and that this increase needs to be taken into account in amendments.

Regarding density maps based on census data:

Pam LaBine: suggested that publicly owned land should be shown in black (or other color that can distinguish areas that will never be developed)

Jennifer: concerns about loss of shoreland plants; she listed purposes of shoreland in s. 281.31, Stats.

Q: small nonconforming houses are often not safe or healthful.

A (Michael): Are you saying that those small houses should be abandoned?

A (Jerry): No! They should be allowed to be expanded!

Management alternatives for density standards:

1) Impervious surface restrictions (19 counties currently have some sort of impervious surface restrictions)

Q. What percentages are counties using?

A. (Carmen Wagner): the range is from about 15 to 25%.

- Different standards for different categories of development

- Mitigation alternatives: on-lot filtration systems; upgrade/maintenance of on-site sewage systems?

Al Shea commented that an increase in impervious surfaces is causing a decrease in groundwater levels.

Committee members felt the following issues should also be discussed:

What about campground uses? (It is a density issue, as well as a water use issue)

Marinas? (Both topics were captured and added to the flip chart of development density issues to be discussed at the March 25th meeting)

Q: We're talking about regulating a limited land resource – only land with water frontage. In 20-30 years all water frontage lots will already be developed.

A (Jennifer): The quality of lakes will reflect the degree of development also.

Comment: There is currently pressure to develop the second and third tier around lakes; using more and more groundwater

Q: What is the difference in the impact of a gravel vs. a paved road?

A: will be discussed at later meeting.

VIII. Shoreland Buffers and Setbacks – Carmen Wagner

Carmen distributed literature reviews of research papers on the issues of buffers and setbacks, and explained where additional information can be obtained.

She reviewed current NR 115 standards – restrictions on vegetation cutting were the most difficult to draft, according to Yanggen and Kusler.

For the revision process, we have labeled buffer zones as “primary” and “secondary” buffers to more easily distinguish these areas.

Primary buffer zone:

Current standard: 0-35 feet from OHWM; (“clear-cut” is not defined) areas outside of 30 foot wide corridor may not be clear-cut.

Secondary buffer zone:

More than 35 feet from OHWM

It was suggested that instead of using term “clear-cut,” we should use “clearing.” In forestry, clear-cut areas are cut and revegetated to grow more trees.

The term “structure” isn't defined in NR 115, but includes (as DNR interprets the rule):

- retaining walls
- fuel pumps and fuel tank issues
- signs (including DNR signs)

Buffer depths (from literature reviews that Carmen distributed)
100 ft. buffer is currently recommended to control phosphorus

Shoreland-wetlands are important to control nitrogen

- 35 to 100 ft. buffer for aquatic habitat
- 100 to 300 ft. buffer for wildlife habitat
- 120 to 1500 ft. buffer for bird habitat

Q: Isn't buffer issue related to waterway classification?

A (Carmen): Not necessarily – depends on the intent of the buffer

Mitigation of a shoreland buffer is often times associated with lake classification.

She listed questions for the advisory committee to consider:

Can we clarify the requirements?

Can we improve achievement of statutory purposes and still allow flexibility for property owners? And to achieve different environmental goals (such as improvement of trout stream habitat)

She listed some management options.

IX. Wrap-up

Shea – decided not to allow comments to the committee from members of the audience. (Public comment period was not on the committee's agenda for this meeting) Perhaps we can allow a public comment period at future meetings.

Toni – At next meeting, we'll discuss specific options related to shoreland setbacks and buffers – If you have suggested options in addition to those posted on the flip charts, please let Toni or Carmen know. (Options will be distributed prior to the meeting)

Next meeting on January 30, 2003.
